INDEX.

PAGE

Reply to Point I of Government's Brief 1

Reply to Point II of Government's Brief 8

Conclusion 15

Cases Cited.

Bruno v. United States, 308 U. S. 287 ..... 8, 9, 10, 11, 12, 14

Bryan, J. Baker, Sr., v. United States (not yet reported) 1

Hersh v. United States, 68 F. (2d) 799 10

Ryles v. United States, 172 F. (2d) 72 14

Stout v. United States, 227 Fed. 799 9

United Brotherhood of Carpenters & Joiners of America v. United States, 330 U. S. 95 14

United States v. Chapman, 168 F. (2d) 997 1

United States v. Johnson, 319 U. S. 503 6

United States v. Ward, 168 F. (2d) 226 14

Statute Cited.

Act of March 16, 1878 14

Rules Cited.

Federal Rules of Criminal Procedure, Rule 30 ..... 11, 12, 13, 14

Federal Rules of Criminal Procedure, Rule 52(b) 14

In the

Supreme Court of the United States

OCTOBER TERM, 1949

No. 172

HARRY W. SCHUERMANN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF

I.

The Court of Appeals held that the net worth-expenditure method of computing net income could be utilized in this case in spite of the fact that there was no evidence establishing petitioner's net worth at the beginning of each taxable period. Both **J. Baker Bryan, Sr., v. United States,** 5 Cir. (not yet reported), and **United States v. Chapman,** 7 Cir., 168 F. (2d) 997, hold that in a net worth-expenditure case there must be a definite starting point based upon a solid foundation. These rulings are in conflict with that of the decision in the instant case.

In the **Bryan** case the Court held that the case should not have been submitted to the jury because the defendant's net worth at the starting point was not established and the evidence did not exclude the hypothesis that the

funds used in making some of the expenditures might have been from resources other than current business income. The situation here is the same. The only evidence noted by the Court of Appeals as being sufficiently substantial to dispense with a definite starting point were petitioner's tax returns for the years prior to 1942. These returns were said to give rise to a permissible inference that there was "little likelihood" that petitioner had accumulated a "large surplus" from his activities. But this is a mere inference, at best, and such an inference may not properly be used as the basis for drawing the further inference that expenditures and investments thereafter made in each of the four following years were attributable solely to current income. This question is presented by the petition for the writ. The Government's Brief does not meet the issue.

The Government says merely that there is "other evidence" not mentioned by the Court of Appeals. But this "other evidence" referred to by the Government is no more substantial in proving receipt of net income than that noted by the Court of Appeals. The weakness of the Government's case is strikingly shown in its contention that the "fact alone" that no tax returns for the years prior to 1936 were found (and therefore presumably not filed) constitutes substantial evidence from which the jury could have inferred (speculated?) that investments and expenditures made in 1942 came from 1942 net earnings, those in 1943 from 1943 net earnings, and so on for the other years.

The argument that petitioner "periodically" furnished cash to a nominee for deposit in a special account for payment to a newly organized corporation refers to an incident involving a portion of the single year 1944. Dur-

ing the organization period of St. Louis Finance Company and as its activities were starting, petitioner advanced funds to one of the three organizers to meet his part of the capital stock payments as they were called for by the corporation. The corporation neither wanted nor desired more funds in its bank account than it currently required for its business purposes. It is not reasonable to believe that this $150,000 finance company would have been organized in early 1944 with only the hope or expectation that petitioner would thereafter "periodically" earn sufficient funds to be turned over to the corporation, and this is particularly so when it is realized that even according to the Government the earnings of petitioner did not exceed $50,000 for both 1942 and 1943 combined, before payment of taxes and living expenses. It is obvious that petitioner must have had available, prior to 1942, the funds which he had agreed, in 1938 (R. 737-738, 734-735), to invest in the corporation. But in any event this evidence can have no application to 1942, 1943 and 1945, each of which years involves a separate charge.

Other than the evidence pertaining to alleged wilfulness, the foregoing is all the evidence cited by the Government as being sufficient to permit the jury to infer that petitioner's investments and expenditures in each year were made out of current income. But none of this evidence removes the case from the realm of speculation.

Without a definite starting point, the case is no longer a net worth-expenditure case. It is merely an expenditure case alone, since there can be no proof of net worth without evidence establishing how much the defendant is actually worth at the commencement of the tax year in question. If in lieu of fixing the accused's net worth at the start of the indictment year one may substitute an infer-

ence, based either upon prior tax returns, or lack of such tax returns, that there is "little likelihood" that he had accumulated a "large surplus", not only is presumption substituted for fact but the presumption itself is left in doubt. How large is a "large surplus"?

It will not do to add all expenditures for the four years, as does the Government, and compare the total with the aggregate reported net income for such period. This for the reason that each year constitutes a separate offense, a fact which has been lost sight of not only by the Court of Appeals but by the Government as well. Actually, when 1942 is considered apart from subsequent years, as of course it must be, no "large surplus" is necessary to take care of the amount of even the alleged disparity between expenditures and reported income. The same is true as to 1943.[1] It will be noted that the net income reported for 1941 was approximately $15,000 and there is no basis in the evidence to support any contention that the major part of this income was not available for expenditure in 1942. The Government's claim that the amount of petitioner's reported income for the years prior to 1942 was barely sufficient to cover his living expenses and a loss of $15,450 does not take into account the 1941 income, for the simple reason that the loss (which was sustained in 1943) was on an investment made in 1940, the year before 1941 income was received. When to the foregoing is added the non-taxable disability income, which in the aggregate amounted to over $11,000 but which was "disregarded"

[1]As to 1942, the Government charged an excess of about $5,400. This includes a Melvin Heil note for $2,000 as to which there is no evidence and a tax payment of $4,353.70, although the correct figure was $2,578.80 (R. 75). Taking account of these items and adjusting depreciation and other items there is virtually no disparity whatever. So, too, as to 1943. Here, the Government failed to give petitioner credit for the conceded loss of $15,450 and charged him with $10,000, the amount of a loan made in January, 1944, on the theory that he "must" have possessed it in 1943 and therefore presumably earned it in that year (R. 637, 644).

by the investigating agent, and the additional income of almost $18,000 for the years 1938, 1939 and 1940 which had not been included in the returns for those years, such items alone account for a much larger amount than would be necessary to make the expenditures for 1942 and 1943 which the Government claims were made from unreported income.[3]

Petitioner respectfully submits that neither the inference used by the Court of Appeals nor the so-called admission from the prior tax returns relied on by the Government in its Brief constitutes sufficient substantial evidence upon which to base a finding that petitioner had no assets as of January 1, 1942, and that all expenditures thereafter made were attributable to current income. It is further submitted that even if this evidence could support a finding that 1942 expenditures were made out of 1942 income alone, in spite of the fact that no "large surplus" would be necessary for such disbursements, there would remain no starting point whatever for each of the subsequent years. If the starting point for 1942 is the assumed lack of a "large surplus" at the commencement of that year, what is the starting point which may be used for each year thereafter? The Court of Appeals overlooked this question and the Government's Brief ignores it on the convenient assumption that the four years constitute a single period of time instead of four separate and distinct years.

The Government presented no evidence whatever of income. It relied merely on the theory that proved ex-

[3]If the $25,000 loan to petitioner from his grandmother is "recognized" (Govt. Br. 14), then even the insubstantial inference from prior returns is of no value as the starting point for 1942 and 1943. The Government's argument that this item would not affect the net worth computation merely begs the issue, since net worth was not proved. Even though the liability offsets the asset, the money would nevertheless be available out of which to make expenditures and investments in excess of current income.

penditures and investments could be assumed to have been made out of current income. But such evidence proves only that petitioner made the expenditures and investments. It may not properly be argued that the 1942 return is an admission against interest which may be used to support the inference that expenditures made in 1943 were made out of 1943 income. This for the reason that the Government has charged that the 1942 return was not correct, and certainly an unreversed conviction for such year constitutes a judicial determination to such effect. The identical reasoning is applicable to the years 1944 and 1945. On the Government's theory, if petitioner had spread a one year's receipt of income or prior accumulation of capital over a ten-year period he would be guilty of ten separate violations of the income tax laws, without any evidence other than the excess of investments and expenditures over reported net income for each year. Petitioner respectfully submits that in view of the fact that each year constitutes a separate charge, the burden is upon the Government, in a net worth case, to prove that the investments and expenditures made in a particular year did not come out of capital held by the defendant as of January 1 of the year in which the expenditures and investments were made. This burden is not sustained where, as here, there is no proof of net worth.

Apparently in an effort to bring this case within the rule of **United States v. Johnson,** 319 U. S. 503, the Government's Brief argues that the "elaborately and deviously woven financial screens behind which petitioner operated * * * show * * * that he had income in excess of that which he reported during the indictment years." Not only is this assertion a non sequitur, but it is not borne out by the record. Petitioner did not operate behind financial screens either "elaborately and deviously woven" or otherwise.

In the **Johnson** case there was a wealth of evidence pertaining to the manner in which the business was operated and the only issue was whether Johnson's relation to the business was that of proprietor or patron. In this case there was not even a scintilla of evidence pertaining to the business operated by petitioner or the manner of its operation. In fact the Government apparently deliberately ignored presenting any evidence as to petitioner's business operations except the designation of such business as policy. What the Government has reference to is evidence offered for the purpose of showing wilfulness. But even this evidence does not approach the strength contended for by the Government. As to 1942 none of the evidence is applicable unless it be the fact that petitioner used currency in making loans in his own name to personal friends. In 1943 petitioner merely rented a safety deposit box in a fictitious name but there was no evidence as to his purpose in renting it or what use he made of it. In 1944 he made an investment in corporate stock. In 1945 he purchased his home in the name of his father and purchased a lot jointly with his wife. The characterization of this evidence as being "elaborately and deviously woven financial screens behind which petitioner operated" does not add to its strength nor does it constitute proof that petitioner received current income in each of the four years in excess of that reported by him. Petitioner respectfully submits that the Government's evidence was insufficient to sustain his conviction and that the Court of Appeals erred in ruling the contrary.

The Government asserts that the Court of Appeals for the Eighth Circuit appraised the evidence in this case and made its finding on the basis of such appraisal. But the opinion shows that the decision was primarily based on the view that income tax evasion cases are different than

other criminal cases and that the judgment of the trial court as to the sufficiency of the evidence is to be heavily relied on on appeal. The Government's Brief ignores petitioner's complaint that he was in effect deprived of his right of appeal by the failure of the Court of Appeals to appraise the evidence independently of the trial court. This is a serious question which should be ruled on by this Court.

Petitioner submits that the opinion of the Court of Appeals clearly discloses its view that a defendant may be convicted of tax evasion for four consecutive years upon evidence showing no more than that the gross amount of expenditures and investments during the four-year period exceeded the aggregate reported net income for such period without a showing of the defendant's net worth at the beginning of each of the four yearly periods. In so ruling and holding, there is the conflict shown by petitioner. It is submitted that the time has come for this Court to squarely consider this important question because of its frequent recurrence. This Court should not permit the severe sentence imposed upon petitioner to stand upon the speculative basis held proper by the Court of Appeals for the Eighth Circuit.

II.

In **Bruno v. United States**, 308 U. S. 287, this Court held that it was error prejudicial to the defendant for the trial court to fail in his duty to instruct the jury that no presumption is created against a defendant who does not testify in his own behalf. The trial court in the instant case failed in such duty and petitioner was materially prejudiced thereby. The Court of Appeals held that the error did not entitle petitioner to a reversal. The conflict with the **Bruno** case is apparent.

The Government's Brief concedes that the instruction requested by petitioner, similar to the **Bruno** instruction, was one which the trial court was obliged to give, but only "when appropriately invoked". The Government contends that the substance of the requested instructions was given by the trial court in his charge to the jury and that the trial court was not sufficiently advised of petitioner's desire to have the attention of the jury directed to the effect to be given to his failure to testify. The Government is in error in both contentions.

In the first place, it cannot reasonably be held that the import of the charge given by the trial court is the same as the import of the requested instruction. Neither the trial court nor the Court of Appeals so held. In fact, the Government did not so argue below. The present contention of the Government appears to be based upon the fact that the charge contained an instruction on the presumption of innocence and the burden of proof. But such instructions should be given in **every** case whether or not the defendant testifies. Defendants who testify are clothed with the same presumption of innocence as those who do not. The burden of proving a defendant guilty beyond a reasonable doubt is upon the Government in **every** case, without regard to whether the defendant testifies.

It is obvious that instructions informing the jury as to the law of the burden of proof and the presumption of innocence do not, and are not intended to, inform the jury in substance or otherwise that the failure of a defendant to testify in his own behalf creates no presumption against him. See **Stout v. United States,** 8 Cir., 227 Fed. 799. Nor does the so-called specific charge that testimony as to expenditures puts no burden on defendant to explain where or how he obtained the money relate to any subject other than the burden of proof. If anything, this

specific instruction was definitely hurtful to defendant because the issue, on the Government's theory, was not so much where or how petitioner obtained the money he spent, but **when** he obtained it (i.e., whether before or during the indictment years), and as to this essential point the charge was silent and might have been construed to place such burden upon petitioner.[3]

In its Brief, the Government argues that petitioner's claim is that the error in this case consisted of the trial court's failure "of his own motion to employ the **precise language** of the **Bruno** instruction." Petitioner has never so contended. His position is simply that it was the duty of the trial court to tell the jury in appropriate language that the fact defendant has not testified creates no presumption against him. The instruction requested by Bruno aptly expresses such rule of law; but the action of the trial court which was held erroneous by this Court was not the failure to employ the "precise language" of the requested instruction but rather the failure to tell the jury in substance what Bruno asked the Court to tell it. That is the complaint which petitioner is here making. There simply was no instruction whatever on the subject.[4]

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[3]Immediately following this portion of the charge, the Court posed a series of questions for the jury's consideration. Some of these could be answered only by petitioner. The last two of the questions were as follows:

"And where did the defendant obtain the money to make these investments?

"Also equally consider, were they made from money held by the defendant before the year 1941 or before the year for which the investments were made and charged against the defendant by the government, or were they made from earnings in the year in which the government charges, and were they shown upon the defendant's income tax return as filed by him?" (R. 900).

In view of the charge, the need for the requested instruction or its substance was all the more vital.

[4]That the Court's charge was "strikingly similar to the language of the second sentence of petitioner's request" (as argued by the Government) means only that *part* of the instruction was given in substance, and that the trial Court intentionally omitted the first sentence telling the jury that petitioner's failure to testify created no presumption against him. This was error. See *Hersh v. United States*, 3 Cir., 68 F. (2d) 799, 807.

The opinion filed by the trial court (74 Fed. Sup. 247) does not even intimate that the trial court believed his charge covered the subject of the requested instruction. In fact, the contrary belief is clearly indicated. Since the substance of the petitioner's request was not included in the charge, the conflict with the **Bruno** decision is obvious.

Using the same erroneous premise as to the nature of petitioner's complaint, the Government's Brief argues that petitioner's objection to the charge was not sufficient to apprise the trial court of his grounds therefor. At least four times in its Brief the Government says that the "ground" of petitioner's objection to the charge was that it did not include "the precise language" of his request. Not once, either in the petition or Brief filed in this Court or in any Brief filed in the courts below, has petitioner contended that it was necessary that the trial court employ the "precise language" of the requested instruction. The ground of petitioner's objection to the charge is not that the precise language of the **Bruno** instruction was not included therein but simply that the Court did not include **any** instruction on the subject of the effect of petitioner's failure to testify. The objection made to the charge adequately states this ground.

The Government further argues that the "belated" submission of petitioner's request for the instruction deprives him of his right to be heard to claim that the charge should have included an instruction on the subject of the requested instruction. This is the point ruled by the court below, and is an important question which should be authoritatively decided by this Court.

Rule 30 does **not** provide that a defendant has no right to request an instruction subsequent to the argument nor that if he does so, error may not be assigned with respect

to the refusal to instruct on this material matter. In the instant case, the trial court did in fact consider the request and refused it after deliberation. Since the subject is one on which a defendant is entitled as of right to have the jury instructed, certainly upon request, it does not comport with justice to hold that although the instruction should have been given and was considered by the trial court before reading his charge, the defendant may not assign error on a matter so vitally affecting his interest. To so hold means that the right to elect whether the instruction should be given is in the trial court and not in the defendant if the request is made after instead of prior to the argument. But the **Bruno** case held that "the accused should be allowed to make **his own** choice." With the liberty of petitioner at stake, it is submitted that he should not be deprived of his right to elect to have the jury told the effect of his failure to testify simply because he submitted his request "belatedly", some 95 minutes before the charge was read to the jury. Rule 30 provides no such penalty. The Court should not impose it.

It is the Government's view, apparently, that petitioner should not be heard to complain of the conceded error affecting his substantial rights for the reason that the trial court was "deprived" of an opportunity to give the requested instruction full consideration. The Brief quotes from statements made by the trial court at the time the instructions were presented, criticizing counsel for the "belated" submission. Although it would seem that with the liberty of petitioner at stake the trial court could, if necessary, take several additional minutes to study the requested instructions, the trial court actually did give full and adequate consideration to the requests. When the trial was resumed over one hour and 30 minutes later, the Court did not even suggest that the consideration he

had given to the instructions was not adequate. He expressly stated that he had considered and reviewed all of them and that "most" of the requests were included in substance in his charge. He did not at any time indicate that he needed or wanted the views of counsel as to the propriety of any of the requested instructions, and Government counsel, although present, maintained complete silence. Moreover, the opinion filed by the trial court does not even imply that the request was inadvertently refused because of lack of opportunity to fully consider the instruction. Surely if the trial court believed that his failure to give the instruction was due to an inadequate opportunity to consider the same he would have said so in his opinion.

But was the request "belated", in view of the argument made to the jury by Government counsel? This question is presented by the petition for certiorari. It was argued in the court below but not referred to in the Court's opinion. The Government's Brief does not consider the question. This Court should.

The last sentence of Rule 30 provides that no party may assign as error any omission from the charge unless he objects thereto before the jury retires to consider its verdict. This portion of Rule 30 does not necessarily refer to a requested instruction. It refers to any omission from the charge which counsel believes prejudices the rights of his client. In the instant case petitioner did object to the omission from the charge of an instruction informing the jury that the fact defendant had not testified in his own behalf did not create any presumption of guilt against him. This objection was made after the Court asked for suggestions on the part of defendant (R. 906). It clearly gave notice to the trial court that petitioner believed the charge was hurtful to him by its omission of such an

instruction. It is difficult to comprehend how much more plainly the trial court could have been advised that petitioner had chosen to have the jury instructed to such effect. What other reason could he have for complaining about the deficiency of the charge on this point?

Even if petitioner had not specifically objected to the omission from the charge, any such assumed violation of the Rule would not preclude review. The Government overlooks (just as did the Court of Appeals) Rule 52(b) which provides that plain errors or defects affecting substantial rights may be noted even though not brought to the attention of the trial court. This rule is in **pari materia** with Rule 30. **Ryles v. United States,** 172 F. (2d) 72[5]; **United States v. Ward,** 168 F. (2d) 226, 228. The error here is plain. It prejudicially affects petitioner's substantial rights. It was, moreover, called to the attention of the trial court in ample time for corrective action. Surely, in a case involving the liberty of a defendant and under the circumstances here present, Rule 30 should not be construed to deprive petitioner of what the **Bruno** case holds is an indefeasible right.

Petitioner submits that the decision below holding that the material error of the trial court prejudicing petitioner's rights does not entitle him to a reversal is not only in conflict with the **Bruno** case but presents an important question of law pertaining to the proper construction of Rule 30 as applied to the Act of March 16, 1878, which this Court should decide.

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[5]In the *Ryles* case, the Court failed to instruct on entrapment. There was no request for such an instruction, no objection whatever to the charge and no suggestion of any further instructions. The judgment was affirmed on the theory that the failure to instruct on the subject was not plain error, under Rule 52(b). This Court vacated the judgment of the Court of Appeals (336 U. S. 949). See also *United Brotherhood of Carpenters & Joiners of America v. United States,* 330 U. S. 395.

CONCLUSION.

Petitioner respectfully submits that a writ of certiorari should be granted to decide the important questions of law involved and resolve the conflict of decisions.

Respectfully submitted,

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